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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. A-758

DIXSIE KIRKLAND, Administratrix of the Estate of
LEROY KIRKLAND, deceased,
Petitioner,

VERSUS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1975

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented for Review	3
Constitutional Provisions and Statutes Involved in This Case	4
Statement of the Case	7
Reasons for Granting the Writ	9
Argument and Authority	10
Conclusion	45

APPENDICES

Appendix "A":

Order Sustaining Motion for Summary Judgment and Dismissal — i

Appendix "B":

Opinion of the Tenth Circuit Court of Appeals affirming Summary Judgment — ii-v

Appendix "C":

Order of Tenth Circuit Court of Appeals denying Petition for Rehearing — vi

TABLE OF AUTHORITIES

CASES: PAGE

American Manufacturers Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 11 F.R. Serv.2d 1220, 388 F.2d 272 (C.A. 2nd, 1967) 44

Atchison, T. & S. Ry. Co. v. Templar, 204 Okla. 460, 230 P.2d 907 24

Buck v. Missouri Pac. R. Co., Okla., 252 F.Supp. 704 (D.C. 1966) 13, 47

Champlin v. Oklahoma Furniture Mfg. Co., 269 F.2d 918, 74 A.L.R.2d 978 (C.A. 10th, 1959) 41

Chicago Rock Island and Pacific R. R. Co., a corp., et al. v. Melot, No. 42662, Vol. 42 O.B.J. (1971), p. 423 25-27

Clark v. Chicago, M., St. P. & P. R. Co., 16 F.R. Serv.2d 739, 55 F.R.D. 302 (D.C.D.S.D., 1972) 11

Donnelly v. Guion, 16 F.R.Serv.2d 900, 467 F.2d 290 (C.A. 2nd, 1972) 11

Dunn v. St. Louis-San Francisco Railway Company, Okla., 370 F.2d 681 (C.A. 10th, 1967) 39-40

Gross v. Southern Ry. Co., 13 F.R.Serv.2d 56, c. 41, C. 3, 414 F.2d 292 (C.A. 5th, 1969) 12, 35, 36-37

Heath v. John Deere Company of Kansas City, 308 F.Supp. 235 (D.C.W.D. Okla., 1969) 37-38

Kurn v. Jones, Okla., 101 P.2d 242 (1940) 26

Miller v. Irby, 227 F.2d 942 (C.A. 10th, 1955), 945 20, 20-22, 34, 37

Miller v. Price, Okla., 33 P.2d 674 (1934) 33-34

Missouri, Kansas & Texas Railroad Co. v. Caster, Okla., 410 P.2d 67 (1965), reh. den. 1965 and 1966 15, 19

Missouri-Kansas-Texas Railroad Company v. Hayes, Okla., 445 P.2d 249 and 445 P.2d 254 (both 1968) 22-24

AUTHORITIES CONTINUED PAGE

Missouri-Kansas-Texas Railroad Co. v. McFerrin, Tex.Civ. App. 1956, 291 S.W.2d 931 36

National Screen Service Corp v. Poster Exchange, Inc., 6 F.R.Serv.2d 1039, 305 F.2d 647 (C.A. 5th, 1962) 44

Oklahoma City-Ada-Atoka Ry. v. Nickels, 343 P.2d 1094 (Okla. 1959) 47

Oklahoma Natural Gas Co. v. McKee, 121 F.2d 583 (C.A. 10th, 1941) 37

Peagler v. Atlantic Coast Line Railroad Company, S.C., 107 S.E.2d 15 (1959) 41, 42-43

Pratt, Read & Co. v. New York, N. H. & H. R. Co., 102 Conn. 735, 130 Atl. 102, 25 N.C.A.A. 79 24-25

Raley v. Thompson, 225 P.2d 171 (Okla. 1950) 18, 18-19

Rogers v. Peabody Coal Co., 9 F.R.Serv.2d 56, c. 41, C. 1, 342 F.2d 749 (C.A. 6th, 1965) 10-11

St. Louis-San Francisco Ry. Co. v. Prince, 145 Okla. 194, 291 Pac. 973, 71 A.L.R. 357 15-16

Sisler v. Jackson, Okla., 460 P.2d 903 (1969) 33

Smith v. Chicago, Rock Island and Pacific Railroad Company, Okla., 498 P.2d 402 (1972) 32-33

Smoot v. Chicago, Rock Island & Pacific Railroad Co., Okla., 378 F.2d 879 (C.A. 10th, 1967) 38, 39, 40

United States v. Diebold, Inc., 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962) 44

CONSTITUTIONAL PROVISIONS:

Oklahoma Constitution, Art. 23, §6 (1907) 5, 31, 33, 37

Oklahoma Constitution, Art. 23, §7 3, 5, 16

STATUTES:

28 U.S.C. §1254(1) 3

28 U.S.C. §1332(a)(1) 2

28 U.S.C. §2106 3

AUTHORITIES CONTINUED

	PAGE
47 O.S. §11-801(a) (1971)	4, 5, 6, 20, 31, 32
66 O.S. §124 (1963)	12, 13, 31
66 O.S.A. §124 (1963)	6, 12, 13, 22, 31, 32
76 O.S. §5 (1970)	4
76 O.S.A. §5(a) (1971)	5-6, 16-17
Georgia Statutes, Sec. 68-1661	36
RULES:	
Federal Rules of Civil Procedure, Rule 56(b), 28 U.S.C.A. (1963), p. 413	6, 10
MISCELLANEOUS:	
Black's Law Dictionary, 4th Ed., "Ordinary" (West Pub. Co. 1968), p. 1249	18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Dixsie Kirkland, Administratrix of the estate of Leroy Kirkland, deceased, hereinafter referred to by her lower court status of plaintiff, respectfully presents to the Court:

I

OPINIONS BELOW

This petition is predicated on the following lower court order and opinion (unreported):

(1) United States District Court for Western District of Oklahoma, Honorable Stephen S. Chandler, Order of March 29, 1974, sustaining Missouri-Kansas-Texas Railroad

Company's (hereinafter referred to as M.K.T. or Defendant) Motion for Summary Judgment; a copy of said Order is attached as Appendix "A."

(2) Tenth Circuit Court of Appeals Order of December 16, 1974, affirming the trial court's order; a copy of the Tenth Circuit Order is attached as Appendix "B."

(3) Tenth Circuit Court Order of January 6, 1975, denying plaintiff's Petition for Rehearing; a copy of the Order is attached as Appendix "C."

II

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C. §1332(a)(1). The plaintiff is a citizen and resident of the State of Oklahoma; the defendant is a Delaware corporation and the amount in controversy, exclusive of costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

(1) Plaintiff asks review of Order Granting Summary Judgment and Dismissing Case dated March 29, 1974; the Order Sustaining Summary Judgment dated December 16, 1974; and the Order Denying Rehearing dated January 6, 1975. (All attached as Appendices "A," "B" and "C.")

(2) The Petitioner applied to the United States Supreme Court for and was granted on March 18, 1974, an Order Extending Time to File Petition for Writ of Certiorari to and including May 6, 1975.

(3) The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the orders of the courts below by Writ of Certiorari are:

(a) Title 28 U.S.C. §1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree";

(b) Title 28 U.S.C. §2106:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

III

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the plaintiff's Amended Petition, if taken as true, states a cause of action against the defendant for the injuries and subsequent death of the plaintiff's decedent.

2. Whether any material issue or issues of fact dispositive of right or duty exist in the cause after examination of the facts discovered by depositions and interrogatories.

3. Whether the granting of summary judgment under the pleadings, facts and circumstances in this case deprive the plaintiff of her right to an action for damages for injuries resulting in death as guaranteed under Art. 23, Oklahoma Constitution, §7, as amended in 1950, and whether said summary judgment wrongfully deprives plaintiff of an

action for injury occasioned by the want of ordinary care of the defendant as provided in Title 76 Oklahoma Statutes §5 (1970); all in violation of plaintiff's rights under the Constitution and Statutes of the State of Oklahoma.

4. Whether the granting of summary judgment under the pleadings, facts and circumstances in this case constitutes the creation of a special class of defendants who are accorded preferential treatment in regard to liability for tortious acts.

5. Title 47 Oklahoma Statutes §11-801(a) (1971) of the Highway Safety Code, or more commonly called the "rules of the road," provides:

> "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead."

Should this statute be declared an absolute defense to an allegation of negligence against a railroad company as a matter of law, where the facts discovered show the vehicle in question to have been traveling at a speed within the statutory limit, and where no fact discovered indicates that the speed was other than reasonable under prevailing conditions?

6. Whether the question of decedent's contributory negligence, if any, under 47 O.S. §11-801(a) (1971), *supra*, is a matter of law or a question to be determined by the trier of fact considering all the circumstances of the case.

7. Whether the trial court and the Tenth Circuit Court of Appeals by their ruling in regard to 47 O.S. §11-801(a) (1971) found *ipso facto* that said statute was violated, thereby depriving the plaintiff of a trial by jury as to the issue of contributory negligence.

8. Whether the Oklahoma Supreme Court by means of judicial legislation has granted to a special interest group, exclusive of all other groups and citizens, and to the prejudice of this plaintiff, a favored status in regard to the laws of negligence of this state without benefit of constitutional or statutory authority.

IV

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. Oklahoma Constitution, Art. 23 §7 (1950), Oklahoma Statutes Annotated, page 853:

> "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount shall not be subject to any statutory limitation. . . ." (Workmen's compensation portion omitted.)

2. Oklahoma Constitution, Art. 23 §6 (1907), Oklahoma Statutes Annotated, page 835:

> "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

3. Title 76 Oklahoma Statutes Annotated §5(a) (1971 Supp.) at page 174:

"Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself, . . ." (Good Samaritan provisions omitted.)

4. Title 66 Oklahoma Statutes Annotated §124 (1963), at page 365:

"Every railroad corporation operating a line of road within this state must erect suitable signs of caution at each crossing of its road with a public highway."

5. Title 47 Oklahoma Statutes Annotated, §11-801(a) (1970 Supp.), at page 46:

"Any person driving a vehicle on a highway shall drive the same at a lawful, prudent speed not greater than nor less than is reasonable and proper having due regard to the traffic, surface and width of the highway and any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead."

6. Federal Rules of Civil Procedure 56(b), 28 United States Code Annotated (1963), at page 413:

"For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

V

STATEMENT OF THE CASE

The following facts are either uncontested or stipulated to by the defendant, M.K.T.:

An action for damages for wrongful death of Leroy Kirkland was originally filed in the District Court of Jackson County, Oklahoma. The case was removed from the state court to the United States District Court, Western District of Oklahoma, by the defendant on the basis of diversity of citizenship. Upon removal the plaintiff demanded a trial by jury.

The plaintiff's husband, Leroy Kirkland, left their home in Hollis sometime in the late afternoon of December 23, 1971, to make a business trip to Lawton, Oklahoma, some 90 miles to the east. Nothing is known of the decedent until 10:20 o'clock p.m., at which time he was driving his 1969 Ford pickup truck in a westerly direction on Bradford Street, Jackson County, Oklahoma.

Bradford Street runs east and west through the City of Altus; at a point west of the city limits of Altus, Bradford Street is intersected by a railroad track owned and operated by the defendant, which runs north and south.

The defendant was involved in a switching operation consisting of 5 cars. North of the Bradford Street crossing the engine operated by the engineer was pushing 3 boxcars, a flatcar and a small dead switch engine in a southerly direction to a spur track. Directly south of the live engine that was pushing the train were the 3 boxcars. The next car was the empty flatcar and the last car in the train was the small switch engine.

Bradford Street is 21 feet wide at the crossing. The flatcar which was stuck by the Kirkland pickup is 48 feet 6 inches in length, and at the instant the flatcar was completely across the street the signalman waved his lantern to the engineer, who brought the train to a dead stop.

The train crew consisted of Arthur B. Peterson, engineer, John D. Blancett, conductor, and Daniel Shermuth Chance, Jr., brakeman. The engineer was in his cab while Blancett and Chance completed the switching operation and gave movement signals by lantern.

When the train stopped with the flatcar across Bradford Street, the two crewmen got off the train. Chance walked to the west of the train to signal the engineer by lantern, while Blancett walked around the south end of the train toward a switching device located east of the track and approximately 40 feet south of Bradford Street.

After Chance completed his signal he followed Blancett to the switching device to assist in moving the mechanism. According to depositions, this was a one-man switch which, due to defects, required the attention of two crewmen to operate it effectively.

Approximately 120 feet to 150 feet to the east of where the collision occurred on Bradford Street, there are two other sets of tracks which are elevated and are referred to as "up and over" tracks. The elevation causes an irregular or up-and-down configuration of the roadway over which Leroy Kirkland was traveling. There was no railroad warning device in place other than a railroad cross-arm sign, which on the night of the collision was grey in color, unpainted and unmarked.

The night was very dark and cloudy, and there was no illumination of any kind at the crossing. However, 100 yards to the west of the flatcar there was a farm yard light.

The immobile flatcar was thin in vertical silhouette, measuring three and one-half feet from the road to the bed of the flatcar, which was empty. The flatcar has a steel undercarriage which extends downward from the bed. The original paint on this flatcar was black but had not been repainted since its construction in 1956. It was dirty and covered with a grease-like material; it contained no visible letterings, markings, lights or reflector tapes. The road upon which it set was black asphalt.

As the two crewmen approached the defective switch located 40 feet south of Bradford Street, they saw the Kirkland pickup come "up and over" the tracks to the east. Both crewmen stated they started toward the street waving their lanterns. The pickup laid down 32 feet of skid marks in a straight line before colliding with the flatcar. Leroy Kirkland languished 10 days and then died as a result of the injuries received on December 23, 1971.

VI

REASONS FOR GRANTING THE WRIT

With the understanding that a review on writ of certiorari by the United States Supreme Court is not a matter of right but of sound judicial discretion, the Petitioner urges the review of this case for the following reasons:

1. The Tenth Circuit Court of Appeals has decided an important state question in a way which conflicts with applicable Oklahoma law.

2. The Tenth Circuit Court of Appeals by affirming the trial court's Order Sustaining Summary Judgment for the defendant has sanctioned a departure from the accepted and usual course of judicial proceedings in regard to cases of this nature.

ARGUMENT AND AUTHORITY

After the pleading stage of this action was completed; after at least 3 pre-trial conferences; after depositions and interrogatories had been taken by both the plaintiff and defendant; and after the suit had been on file since March 2, 1973, a period in excess of 12 months, the United States District Court for the Western District of Oklahoma, upon motion by the defendant, entered summary judgment in favor of the defendant and dismissed the action. No affidavits or counter affidavits were filed by either party, each relying entirely upon the pleadings, depositions and interrogatories.

The entry of a summary judgment under the facts and circumstances of this case contravenes the intended purpose of Rule 56(b), Federal Rules of Civil Procedure.

Issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner. It is only in the exceptional negligence case that Rule 56 should be invoked. And even where the trial judge reasonably may surmise that the plaintiff is unlikely to prevail upon a trial, that is not sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them. *Rogers* v.

PeabodyCoal Co., 9 F.R.Serv.2d 56 c. 41, Case 1; 342 F.2d 749 (C.A. 6th, 1965).

Similar interpretations of Rule 56 have been adopted by the majority of circuit courts. Summary judgment is improper where, although the basic evidentiary facts are undisputed (as in this case) the case stands or falls on the inferences that may be drawn from the facts. *Donnelly* v. *Guion*, 16 F.R.Serv.2d 900, 467 F.2d 290 (C.A. 2d, 1972).

Issues of negligence and such related issues as wanton or contributory negligence are ordinarily not susceptible of summary adjudication either for or against a claimant and should be resolved at trial. Summary judgment should not be granted on the ground of contributory negligence except in an extraordinary case where the facts are conceded or demonstrated beyond question and show a right to summary judgment with such clarity as leaves no room for controversy. Thus, in an action to recover for injuries sustained when plaintiff's automobile collided at a railroad crossing with defendant's train, where defendant relied on the defense of last clear chance, since a material issue of fact existed as to whether defendant's train crew could have slowed the train sufficiently to have allowed plaintiff's automobile the fraction of a second which it needed to pass safely, summary judgment for defendant was not proper. *Clark* v. *Chicago, M., St. P. & P. R. Co.*, 16 F.R.Serv.2d 739, 55 F.R.D. 302 (D.C.D.S.D., 1972).

Issues of negligence, contributory negligence and proximate cause, the resolution of which requires the determination of the reasonableness of the acts and conduct of the parties under all the facts and circumstances of the

case, cannot ordinarily be disposed of by summary judgment. *Gross* v. *Southern Ry. Co.*, 13 F.R.Serv.2d, 56 c. 41, C. 3, 414 F.2d 292 (C.A. 5th, 1969).

In the *Gross* case, *supra*, there was a disputed issue of fact as to whether railroad was guilty of negligence by failing to have a crossbuck railroad sign at crossing that was plainly visible to persons approaching the crossing from the west at the time and place of the train-automobile collision. The Fifth Circuit held that this issue precluded granting of summary judgment in favor of defendant railroad.

In the case at bar the defendant, M.K.T., does not contest the allegation that the crossbuck sign at the crossing was grey and unpainted, but merely argues that the railroad is under no duty to provide a visible warning under prevailing Oklahoma decisions and contrary to the statutory requirement that such sign be in place. The defendant's rationale is that the absence or invisibility of the crossbuck sign cannot be the proximate cause of the accident!

The *Gross* case, *supra*, is of special interest in that it also involved a train occupying a street crossing. The auto involved struck the 30th car of the defendant's moving freight train. Leroy Kirkland struck a motionless flatcar.

If the case at bar is analyzed in relation to the warning sign in place at the time of the collision, it will be readily apparent that this case should not have fallen victim to summary judgment.

A. The law requires that a suitable sign of caution be in place at each railroad crosisng in this state. 66 O.S. §124 (1963), *supra*.

B. Two uncontested facts in this case create a question of fact for the jury: (1) The sign was grey, unpainted and unmarked; and (2) the flatcar upon the crossing was so obscure that reasonable men could differ as to whether it constituted a suitable warning to the decedent.

The plaintiff argues that the sign was not "suitable" as required by law, and the Oklahoma courts have held that 66 O.S. §124 (1963), *supra*, was intended as a safeguard to the motoring public. *Buck* v. *Missouri Pac. R. Co.*, Okla., 252 F.Supp. 704 (D.C. 1966).

The defendant, on the other hand, urges adoption of the general rule that *ordinarily* the presence of the train on the track is sufficient warning. This line of logic must presuppose that the train on the track would be at least as adequate a warning device, that is, be as visible to the public, as a "suitable" statutory device. So to sustain the summary judgment and then to affirm it, the trial court and the Tenth Circuit Court had to indulge in the presumption that the black flatcar upon the roadway was an adequate substitute for the statutory warning device required.

The Court has said, in essence, that a low-profile, black, dirty, unmarked flatcar, situated on an unlighted black asphalt crossing is an adequate substitute for the suitable sign of caution to the motoring public as required by law. 66 O.S. §124 (1963), *supra*.

It may very well be true that under certain factual circumstances a railroad car across a roadway would serve as adequate warning. The point, however, is that whether it is or not is a disputed issue of fact that should be submitted to a jury, and such a dispute cannot be resolved by

a construction of the statute or by application of a general rule. The jury could find as a fact that the sign was not suitable as required by law and that the flatcar upon the crossing was an inadequate warning under the circumstances. The disputed issue of fact as to whether the flatcar was a suitable substitute for the defective statutory warning device is the most important issue in this case.

Leroy Kirkland laid down 32 feet of skid marks prior to impact. This fact, the defendant asserts, proves the decedent saw the flatcar. This fact, the plaintiff asserts, proves only that he did not see the flatcar until it was too late. Leroy Kirkland, just prior to succumbing to unconsciousness, said to Chance, the brakeman:

"I didn't see you."

The only logical meaning to this statement is that he didn't see the flatcar soon enough. No railroad warning lights (even the light from the pushing engine was 3 boxcars north of the road and behind a boxcar), signals, bells, notices, buzzers, guards, signalmen or other warning of any kind was present—only the black immobile obstacle across the road. It is a travesty and an assault upon the constitutional and statutory rights of the private citizen of this state for the Court to hold that a railroad corporation may, as it sees fit, substitute the statutory warning requirement with its own warning, in this case an invisible flatcar, and thereby escape liability.

The "standing train" rule is never invoked if special or extra-hazardous circumstances exist at the crossing. Whether or not such circumstances exist is a question of fact for the jury.

Conditions at a railroad crossing change from one time to another, and especially from daytime to nighttime. A special warning or flagman might not be required at one time, and yet it might be negligence to fail to provide one at another time. This is an especially important consideration in this case, considering all of the attending circumstances of the collision.

In the *Buck* case, *supra*, it was stated that failure to comply with the requirements of Title 66 O.S. §124 (1963) may constitute primary negligence. If the defendant had merely failed in the case at bar to comply with the statute and had in fact substituted a visual warning "suitable" to provide protection to the public, then fine, the decedent would probably have escaped injury and death; but to first ignore the law and then to place a deceptive and camouflaged obstacle in decedent's path under the prevailing conditions is repugnant to all concepts of fair play, justice, right and wrong, or whatever term one might wish to employ.

The Oklahoma Supreme Court, at page 70 in the case of *Missouri, Kansas & Texas Railroad Co.* v. *Caster*, Okla., 410 P.2d 67 (1965), *reh. den.* 1965 and 1966, quoted from *St. Louis-San Francisco Ry. Co.* v. *Prince*, 145 Okla. 194, 291 Pac. 973, 71 A.L.R. 357, as follows:

> "Where a crossing is unusually dangerous, because of its peculiar construction and situation and the amount of traffic passing thereover it is the duty of the railway company to exercise such reasonable care and take such precautions as common prudence would dictate, taking into consideration the nature of the crossing; *and whether or not a given crossing is unusually dangerous is a question for a jury, unless only*

one conclusion could be drawn by all reasonable men from the evidence relative thereto.

"Whether ordinary care or reasonable prudence requires a railroad company to erect and maintain warning signs or other warning devices in addition to those required by statute at a crossing over a public highway in the country *which is unusually dangerous is a question of fact for a jury.*" (Emphasis added.)

Oklahoma case law generally holds that absence of an adequate warning sign as required by statute does not constitute negligence since a standing railroad car upon a crossing is an *equally* effective warning. This is a judicial presumption that cannot be applied to this case. Whether a standing railroad car upon the tracks constitutes an equally effective warning to an approaching motorist must be determined by the type and condition of the railroad car in relation to the conditions prevailing at the crossing at the time of the collision. To presume, as the Court must, that in each and every case the traveling public is adequately warned by the presence of any obstruction under all conditions effectively denies this plaintiff and others trial by jury. The law abhors presumptions—especially if they are indulged in at the expense of parties litigant.

Such presumptions on the part of the Court constitute a form of judicial legislation abrogating plaintiff's right of action to recover damages for injuries resulting in death guaranteed by the Oklahoma Constitution, Art. 23 §7, *supra*.

The Oklahoma Legislature places the responsibility for injury to another upon the tort feasor, Title 76, O.S. §5(a) (1971):

"Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to

another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself, . . ."

If the Court is permitted to indulge in presumptions for and on behalf of railroad companies, then the Court has created a special class of citizens who are not subject to the provisions of the above cited tort statute. The statute says "everyone"—which should be construed to mean railroad corporations as well as everyone else.

In the last paragraph on page 3 of the Tenth Circuit Court's Opinion, the general rule is stated:

"The general rule in Oklahoma is that the presence of a train or railway car on a crossing is sufficient notice to the driver of a vehicle on the highway of obstruction; in the absence of unusually hazardous circumstances the operating railway company is under no duty to provide notice or warning of the danger to drivers. *Raley* v. *Thompson*, 225 P.2d 171 (Okl. 1950)."

There is more to the paragraph, but first consider. ". . . presence of a train or railway car . . . *is* sufficient notice. . . ." This is the statement of an absolute. All types, shapes and colors of railway cars are included in that rule. To illustrate the absurdity of such a holding one only needs contemplate the existence of a plexiglass railroad car upon a crossing; or a camouflaged car—one which would fit perfectly into its surroundings—like a black, dirty flatcar sitting on a black asphalt street with no light in the immediate vicinity. May the Court pre-empt the jury and hold as a matter of law that the traveling motorist is always adequately warned regardless of conditions or circumstances, or must each case stand or fall on its own merits?

The case of *Raley* v. *Thompson*, 225 P.2d 171 (Okla. 1950), is cited by the Circuit Court as authority for the general rule. Close scrutiny of that case is therefore imperative.

First, the rule as cited by the Tenth Circuit Court from *Raley, supra*, is an inaccurate recital of the law propounded in *Raley*. The Court of Appeals omitted one word from the general rule, "ordinarily." The entire recital is found at paragraph (2), page 173 of the opinion.

> "(2) *Ordinarily* the presence of a train or railway cars on a crossing, whether moving or stationary, is sufficient notice to a driver of a vehicle on the highway of such obstruction, and in the absence of unusual circumstances the operating railway company is not under any duty to provide any other notice or warning." (Emphasis added—citations omitted.)

The omitted word is of extreme importance. "Ordinary" is defined in Black's Law Dictionary, 4th Ed., West Pub. Co. (1968), at page 1249:

> "ORDINARY, adj. Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by or characteristic of, the normal or average individual. . . ." (Citations omitted.)

Therefore, what *Raley, supra*, says is that under usual, normal, common, customary, or reasonable circumstances the presence of a railway car on a crossing, whether moving or stationary, is sufficient notice to the motoring public of its presence.

In *Raley, supra*, the plaintiff struck the 25th car of a moving freight train, which was legally upon the crossing. The time was approximately 2:00 a.m. The track and crossing were heavily used by the railroad and traveling public; lights from an automobile approaching from the opposite direction could be seen by the plaintiff through and under the boxcars. The only warning was a stationary cross sign showing there was a railroad crossing ahead. Plaintiff further alleged that his injuries were proximately caused by the defendant's failure to have at said point of intersection adequate warning signals in view of the extremely hazardous crossing above described.

Since the *Raley* decision the Oklahoma Supreme Court has held in *Missouri, Kansas & Texas Railroad Co.* v. *Caster, supra*, at page 70, that whether ordinary care or reasonable prudence would require additional warnings at the crossing involved is a question of fact for the jury; the decision also holds that the question of whether the crossing is unusually dangerous is also for the jury to resolve.

Therefore, the *Raley* case is not only misquoted as to the law, but has been modified by later decisions.

We have been analyzing the rationale used by the Tenth Circuit in sustaining defendant's summary judgment. Continuing with the remainder of the last paragraph on page 3 of that decision, we find this statement:

> ". . . The rule stems in part from the Oklahoma Supreme Court's application to occupied crossing cases of the State statute requiring drivers of motor vehicles on the highway to drive at a speed and with a degree of care that will enable them to stop within the clear distance ahead."

The above quote is footnoted with a recital of 47 O.S. §11-801(a) (1971), which is also quoted herein at pages 4 and 6.

The applicability of the Highway Safety Code, Title 47 O.S., also known as "Rules of the Road," to actions in negligence, questions of proximate cause, foreseeability and contributory negligence are questions which must be resolved by the trier of the facts.

In an opinion written by the Honorable Alfred P. Murrah, the Tenth Circuit said in *Miller* v. *Irby*, 227 F.2d 942 (C.A. 10th, 1955), at page 945:

> "And, whether a violation of a statute or traffic regulation is the proximate cause of a collision is usually for the jury. Blashfield, Vol. 10A, §6601, p. 318."

The *Miller* case, *supra*, involved an alleged violation of the Highway Safety Code, Title 47 O.S. Supp. §121.6(d), which requires a motorist to stop his vehicle at the entrance of a through highway. The plaintiff stopped, but he did so 175 feet prior to the entrance, and the defendant urged in a trial before the court below, jury being waived, that the plaintiff's conduct constituted contributory negligence *per se*, therefore requiring a reversal of the trial court's judgment in favor of the plaintiff.

The applicable rule of the road in the *Miller* case was given entirely different treatment by the Tenth Circuit Court of Appeals at page 944 of the opinion:

> "(2, 3) Certainly no one can validly contend that merely stopping at the stop sign 175 feet from the entrance to the intersection constituted compliance with the letter or spirit of the statute requiring the driver of a motor vehicle to stop at the 'entrance' to

> the intersection, any more than it can be said that stopping at the entrance to the intersection gave the motorist a license to proceed into the intersection with impunity. *The purpose of the statutes and the rules of the road is to impose a standard of care commensurate with the hazard involved, and the requirement that an unfavored motorist shall stop at the entrance of the intersection is but a recognition of the necessity for orderly traffic based upon rational and common sense considerations.*" (Emphasis added.)

The rule of the road in the *Miller* case, *supra*, was applied in the manner intended—a mere recognition of the necessity for orderly traffic based upon rational and common sense considerations. The opinion went on to say that the Oklahoma courts had previously held that it was not intended that motor vehicles should stop at the exact spot or place where the sign was erected, *but it was intended as a warning to stop at the intersection*. As to this Oklahoma construction, the Tenth Circuit said at page 944:

> "But we do not understand the Oklahoma Court to mean that the failure to stop at the intersection is negligence as a matter of law."

And at page 945:

> "Still other courts have held that failure to stop at stop signs erected under statutory authorization does not create an immutable standard of conduct for motorists, the violation of which courts must declare to be negligence, regardless of all other facts and circumstances."

Even more compelling language is also found at page 945:

> "But even though the failure to stop at the entrance of the intersection may be said to be *contributory neg-*

ligence per se, it is not actionable unless it is also shown that such contributory negligence was the proximate cause of the harm." (Emphasis added.)

The *Miller* application of the rules of the road as compared to the application made in the case at bar gives rise to the inference of preferential treatment of certain classes of defendants, *i.e.*, railroads. It is not negligence as a matter of law to fail to stop at a stop sign under the applicable state statute, but it is negligence as a matter of law to be unable to stop short of running into the side of a black flatcar at night, even though there is no finding anywhere in the case at bar that the decedent was operating his vehicle in a manner other than reasonable under all the circumstances.

The trial court and the Tenth Circuit placed a reasonable judicial interpretation upon one set of Oklahoma decisions dealing with two-car accidents in relation to rules of the road and an immutable, inflexible interpretation upon another line of decisions dealing with railroads in relation to rules of the road. This is a double standard.

The third paragraph of page 4 of the Tenth Circuit Order affirming summary judgment for the defendant states that under the law of many states the cited facts would prevent granting of summary judgment, "but the law of Oklahoma is clearly otherwise." This last quoted portion of the opinion is clearly an erroneous construction of the Oklahoma Constitution, Statutes and decisions.

The Oklahoma Supreme Court has held in two companion cases, *Missouri-Kansas-Texas Railroad Company* v. *Hayes*, Okla., 445 P.2d 249 and 445 P.2d 254 (both 1968), Syllabi 1. and 2. at page 250:

"1. Ordinarily, the presence of a train on a crossing, whether moving or stationary, is sufficient notice to the driver of a vehicle on the highway of such obstruction, and, in the absence of unusual circumstances, the operating railroad company is not under any duty to provide any other notice or warning. However, where in an action for damages for personal injuries suffered by the occupant of an automobile which collided with a train at a crossing, the evidence indicates that the crossing was an extra-hazardous one, and the auto and the train arrived at it almost simultaneously, this rule may not apply.

"2. Where, in such a case, the evidence tends to show that the crossing, in view of the geographical configuration of its vicinity, the presence of obstructions to motorists' view of approaching trains, the amount of travel over the crossing, etc., is an extra-hazardous one, such evidence may be sufficient to submit, for the jury's consideration, the issue of whether, or not, the defendant railroad company was obliged to provide more than the statutory warnings, in order to discharge its duty of reasonable care, even where the obstructions to the motorists' view are not on the railroad's right-of-way."

In the *Hayes* cases, *supra*, the Court allowed the jury to determine whether the geographic configuration of the tracks' vicinity, the amount of travel over the crossing and other factors rendered the crossing "extra-hazardous" and removed it from the general rule that ordinarily the presence of a train on a crossing, whether moving or stationary, is sufficient notice. The jury was allowed to determine whether under the circumstances existing at the crossing the railroad was obligated to provide more than statutory warning in order to discharge its duty of reasonable care.

The cases differ from the case at bar in that the automobile and the train in the *Hayes* cases met almost simultaneously. But this does not change the general rule announced therein which applies to the case at bar:

> That under extra-hazardous conditions the presence of a train upon the track may not constitute sufficient notice to the motoring public of its presence and raises a question to be determined by the jury.

It is significant also that the defendant railroad in *Hayes*, the same defendant as in this case, advanced the same defense as is asserted here, that because the train was already upon the crossing when the auto struck it that it was the driver's duty to stop the car before colliding with the train. The Court rejected the argument due to the almost simultaneous arrival of the train and auto, citing *Atchison, T. & S. Ry. Co.* v. *Templar*, 204 Okla. 460, 230 P.2d 907, which held that the fact that the train was already upon the crossing when the auto hit it did *not* relieve the defendant railroad from its duty to warn the auto's driver of the train's approach.

The Court in *Hayes, supra*, cited *Pratt, Read & Co.* v. *New York, N. H. & H. R. Co.*, 102 Conn. 735, 130 Atl. 102, 25 N.C.A.A. 79, as holding:

> " * * * when the crossing is not the ordinary one, but is more than ordinarily dangerous by being much traveled, *or by having the view of the track obstructed by the railroad or by others*, or because of the noise making the ordinary signal difficult to hear, or by reason of a like cause, it becomes a question of fact for the jury to determine, what, if any, additional signals or precautions should have been maintained by the

> railroad in the exercise of its duty of using reasonable care." (Court's emphasis.)

The Hayes collision occurred between 11:00 and 11:50 a.m., on a clear July day. Leroy Kirkland struck the side of a black flatcar at approximately 10:20 p.m. on a dark, cloudy December night. The contrast does not require additional comment.

What the Supreme Court of Oklahoma has done is hold that certain elements when considered alone do not create extra-hazardous conditions. This Petitioner contends that were this set of circumstances in total presented to the Oklahoma Supreme Court, it would hold the combination of circumstances sufficient for submission to a jury. This statement is not entirely unfounded, as will be seen from the following argument.

A case factually very similar to this case was allowed to go to the jury in an Oklahoma District Court. The case is *Chicago Rock Island and Pacific R. R. Co., a corporation, et al.* v. *Melot*, No. 42662, Vol. 42, p. 423 of the Oklahoma Bar Journal (1971). The Court of Appeals of Oklahoma wrote an opinion sustaining the jury verdict in favor of the plaintiff and then before the mandate was filed the case was settled.

The Petitioner recognizes that the *Melot* opinion is not the law in Oklahoma because it was not finally adjudicated by the highest court in the state; but, because it is factually so similar to the case at bar and because the language from the opinion is so logical and compelling, some aspects require discussion here.

The plaintiff, Mrs. Melot, received injuries when the auto in which she was riding collided with the side of a very slow-moving, grey, muddy-colored flatcar at 11:00 o'clock p.m. A trial by jury resulted in a favorable verdict to the plaintiff, and an appeal was taken, the disposition of which has already been explained. The Court of Appeals rejected the defendant's contention that the trial judge should have directed a verdict for the defendant on the grounds that the evidence was insufficient to show any primary negligence. The defendant railroad relied principally on the case of *Kurn* v. *Jones*, Okla., 101 P.2d 242 (1940), as authority for its position. The Appeals Court cited from *Kurn, supra,* the following extremely important principles that come into play in the case at bar.

> "If the Court is of the opinion that reasonable men might differ as to whether the trainmen in the exercise of reasonable care might have anticipated the accident, then the jury should be allowed to decide the question of primary negligence and of proximate cause.
>
> * * * * * *
>
> "The presence of the train standing on the track did not constitute negligence. * * * We have no statute defining the duties of the railroad company in cases of this character. But a party in the exercise of a legal right may be held liable for injuries resulting therefrom to others *if in the performance thereof he might have reasonably foreseen or anticipated the injury and failed to exercise reasonable care in warning the injured party of the existing dangers.* If on the evidence reasonable men might differ as to the degree of care required under the circumstances, the jury must say whether the defendant was negligent in this respect." (Emphasis added.)

While the *Melot* case is not the law, the quotations are the words of the Oklahoma Supreme Court in the *Kurn* case. Apply those principles to the allegations and proven facts in the case at bar and it leads to the inescapable conclusion that reasonable men might conclude that the crewmen operating the defendant's train could have anticipated or foreseen the collision and resulting injuries to Leroy Kirkland, deceased; that they failed to use reasonable care in warning the decedent of the existing danger; and that a greater degree of care for the safety of highway travelers was required under the circumstances.

There is no need to quote extensively from depositions in this case due to the agreement by the parties as to most of the salient facts. However, as to the issue of foreseeability as that term was used in *Kurn, supra,* the Court needs to have the following information, contained in the deposition of Sgt. Eddie Becerra, the investigating officer. Mr. Becerra questioned a crew member at the scene who identified himself as a flagman (it was later ascertained by deposition that this was David Shermuth Chance, Jr.), and according to Sgt. Becerra's deposition the following exchange took place, at page 10:

> "Q. Did he tell you anything about how this incident happened?
>
> A. Yes, sir, he did.
>
> Q. All right, would you tell us to the best of your recollection what he said?
>
> A. He was there at the scene, and he was the one that approached me first, and I asked him how it happened and he said that he was at the switch, which was approximately 13 steps away from the road itself.

Q. How do you know it is 13 steps, Officer?

A. I measured it myself.

Q. What direction from the road?

A. South.

Q. Thirteen steps from the South edge of Bradford Street?

A. Yes, sir.

Q. Go ahead now?

A. And he told me that he was there doing something and when he turned around and saw the car coming he started running back towards the road trying to flag this vehicle down, but couldn't get back there in time."

Later in the evening Sgt. Becerra received a phone call at police headquarters from the same man he had spoken to at the scene and whose conversation is related above. This time, after making inquiry as to Mr. Kirkland's condition and being asked by Becerra to repeat the circumstances surrounding the collision, this man changed his original version of the incident as follows from Becerra's deposition at pages 16, 17 and 18:

"Q. You asked him to repeat what he had told you?

A. Yes, sir. And then he said that he was definitely there on West Bradford Street.

Q. When?

A. At the scene of the accident.

Q. At the time the accident happened?

A. Yes, at the time of the accident.

Q. Can you remember what his words were when he told you that?

A. That is it. That he was definitely on the middle of the—that he was on the street.

Q. Did he say definitely?

A. Yes, sir.

Q. He used that word?

A. Yes.

Q. Did you call to his attention the fact that he had told you previously that he was not on the street when the accident happened?

A. No, sir, I did not.

Q. You didn't?

A. No, sir.

Q. Did he try to explain to you why he had told you the first story?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. Was it your understanding of that phone conversation that the man who you had talked to at the scene of the accident and who had told you that he saw the Kirkland vehicle from a position by the switch and tried to get back to Bradford Street had now changed his story and said he was in fact on Bradford Street when the vehicle came?

A. Yes.

Q. Did he say he signaled to Mr. Kirkland while he was there on Bradford?

A. Yes.

Q. Did he tell you that he signaled to Mr. Kirkland by phone, when he talked to you by phone, did he say, 'I was there on Bradford Street and I signaled'?

A. No, sir, he did not.

Q. Then the only part of his version of the accident that had changed was where he was when he saw the Kirkland vehicle?

A. Yes."

Might not reasonable men infer from the above conversation that this member of the train crew foresaw or knew he should have foreseen the collision and that he knew or should have known that he failed to use reasonable care in warning the decedent? Otherwise, why would a man with 23 years seniority with this defendant railroad deem it necessary to call the investigating officer and tell him that he was in fact upon the roadway signaling to Mr. Kirkland at the time of the collision, contrary to his original version given at the accident scene?

Another member of defendant's crew, Arthur B. Peterson, engineer, was also aware of the extra hazard created at the Bradford Street crossing. The following information was elicited from Sgt. Eddie Becerra, at pages 8 and 9:

"Q. Did you talk to any other crew member?

A. Yes, sir, I did.

Q. Did you talk to Mr. Peterson (the engineer) in regard to the flatcar itself?

A. No, but he did mention something about it.

Q. What did he say?

A. He said there was another gentleman that was standing by him, I didn't know who he was.

Q. Was he a member of the train crew?

A. I don't think so. All three of us were carrying on a conversation, *and then Mr. Peterson said they should have some reflectors on this kind of train here.*" (Emphasis added.)

Assuming, as we must, for purposes of summary judgment consideration, that the evidence and reasonable inferences to be drawn therefrom are true, then is the plaintiff not entitled to the inference that the engineer, Mr. Peterson, *knew* that the condition of the flatcar created an extra-hazardous obstacle when parked completely across a roadway. Could not it be reasonably inferred from the quoted deposition that the engineer should have foreseen the natural and probable consequences of his parking this 31½-ton monster across the path of oncoming traffic?

The decisions of the Oklahoma Supreme Court are not as immutable and inflexible regarding primary negligence as appears from the Opinion of the Tenth Circuit affirming summary judgment in favor of the defendant.

The defendant successfully asserted that the warning sign statute, 66 O.S. §124 (1963), had no application in this case. The Defendant also successfully prevailed upon the courts to announce the plaintiff guilty of contributory negligence as a matter of law under 47 O.S. §11-801(a) (1971), *supra*.

Under the Constitution of this state, Art. 23 §6, *supra*, the defense of contributory negligence in all cases is a question of fact and shall, at all times, be left to the jury.

Contributory negligence is not susceptible to summary adjudication under the pleadings, facts in this case, and the Oklahoma constitutional provision that contributory negligence shall in all cases be a question of fact for the jury.

Under Oklahoma law, as it was when this collision occurred (comparative negligence law has since been enacted), if the plaintiff's decedent was guilty of the slightest degree of contributory negligence, then the jury would upon such a finding be entitled to deny plaintiff recovery. Nevertheless, it is a question for the jury to resolve and not for the Court. A genuine factual dispute as to plaintiff's decedent's negligence has never been raised in this case other than to cite a rule of the road, 47 O.S. §11-801(a) (1971), *supra*, which was also quoted by the Tenth Circuit Court in their opinion at page 4. The Court of Appeals went on to say in the first paragraph on page 4:

> "That court (Supreme Court of Oklahoma) has repeatedly held that trainmen are not required to anticipate that a motorist will disregard the duties thus placed on him by the law."

"The law" to which the Court of Appeals had reference was 47 O.S. §11-801(a) (1971), *supra*.

Contra, the motorists of the State of Oklahoma are not required to anticipate that a railroad will disregard the duties thus placed on it by the law. 66 O.S. §124 (1963), *supra*.

In *Smith* v. *Chicago, Rock Island and Pacific Railroad Company*, Okla., 498 P.2d 402 (1972), action was by Betty Sue Smith, Administratrix, against the defendants for damages for the wrongful death of her husband. After

verdict and judgment for the defendants in the District Court of Canadian County, plaintiff appealed. Judgment of the trial court was reversed and the cause remanded for new trial. At page 404 of that opinion the Court reiterated its position in regard to contributory negligence as previously set out in *Sisler* v. *Jackson*, Okla., 460 P.2d 903 (1969):

> "Therein we said: ' * * *. Were it not for article 23, §6, of the State Constitution, which provides that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury," it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery.' "

And further on the same page:

> "What we did hold was that there was evidence of contributory negligence, and under Article 23, §6, Const., it was the duty of the court to let the jury determine whether there was in fact contributory negligence, and if so, whether this negligence was the cause of the death, or contributed thereto.
>
> "The receiver for the railroad company (Dickinson) contended in this court and in the Supreme Court of the United States that the railroad company had a vested right in the common law defense of contributory negligence which (he contended) was made permanent, or frozen in, by the 14th amendment to the U. S. Constitution. Both courts rejected that view."

The *Smith* case, *supra*, provides us with the historical application of Article 23, §6 of the Oklahoma Constitution. Prior to the case of *Miller* v. *Price*, Okla., 33 P.2d 674 (1934), the Oklahoma Supreme Court condoned the practice of the lower courts giving an instruction on contribu-

tory negligence although there was no evidence of contributory negligence. This practice was condemned in *Miller, supra*, and the Court announced that henceforth the same rules as to primary negligence would apply to the application of the defense of contributory negligence; that is, the facts upon which said defense are based *would be passed upon by a jury without interference on the part of the court.*

Three rules of law were established in the *Miller* case, *supra*, which were recited by the Court at page 405: (1) The defense of contributory negligence, although pleaded, is not a defense until there is some evidence of contributory negligence; (2) if there is any evidence of contributory negligence, it is within the exclusive province of the jury to determine whether there was in fact contributory negligence, and if so, whether the contributory negligence caused or contributed to the injuries; and (3) that the defense of contributory negligence is not a question of law for the jury.

There is no fixed standard in the law of Oklahoma by which a court may say in every case what conduct shall be considered reasonable and prudent, and what shall constitute due care in approaching a crossing under any and all circumstances. Accordingly, the law has relegated the determination of such questions to the trier of facts. It is for the trier of facts to note the special circumstances and surroundings of each particular case and then say whether the conduct of the parties measured up to the standard required by law. To remove these questions from the trier of fact when a jury trial is requested is to take a giant step toward abolition of trial by jury.

The application of the Highway Safety Code of Oklahoma as a bar to recovery by the plaintiff as a matter of law is error. In *Gross* v. *Southern Railway Company*, 414 F.2d 292 (C.A. 5th, 1969), the defendant railroad urged as authority for sustaining the lower court's granting of summary judgment application of Section 105-603 of the Georgia Code Annotated as follows:

> "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases, the defendant is not relieved, although the plaintiff may in some way not have contributed to the injury sustained."

The rule was defined in the following language:

> "*A person can not be charged with the duty of using any degree of care and diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence.* The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence * * *. *Failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should have been reasonably apprehended will not preclude a recovery.*" (Emphasis added).

The defendant said the rule barred plaintiff's recovery because the driver of plaintiff's car failed to heed the warnings and instructions of two highway signs, and that by so failing was guilty of negligence *per se*. But the Court rejected this argument saying that even if Gross was thus

guilty of negligence, such negligence does not automatically bar a recovery by plaintiffs. This, said the Fifth Circuit, is a jury question. The defendant in *Gross, supra,* then alleged violation by the plaintiff of another section of the Georgia Statutes, Section 68-1661, which provides:

> "Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely, when:
>
> * * * * * *
>
> "(c) An approaching train is plainly visible and is in hazardous proximity to such crossing."

The Court cited a landmark case construing this statute, *Missouri-Kansas-Texas Railroad Co.* v. *McFerrin*, Tex. Civ. App. 1956, 291 S.W.2d 931, 934, which held that neither duty recited in the statute comes into existence until these three conditions exist: (1) A train must be "approaching" the crossing; (2) the approaching train must be "plainly visible," and (3) the train must be "in hazardous proximity" to the crossing. The Court in *Gross, supra,* said the statute does not apply in the instant case, becaues the very first condition required by the statute, as pointed out in the *McFerrin* case, *supra,* was not present; namely, the train was not "approaching" the crossing, but had already passed over it when Gross approached it in plaintiff's car. Further, the Fifth Circuit continued, *even if it could be said, arguendo, that the statute is applicable to our case, we still have a jury question as to whether or not the train was, or should have been, "plainly visible" to Gross in the exercise of ordinary care, as he approached the crossing.*

The Fifth Circuit then applied the objective common-law test of the reasonably prudent man to the situation and said it must appear, as a matter of law, that a reasonably prudent person, situated as was the motorist and exercising ordinary care for his own safety, should have seen the train *which was already occupying the crossing.* But, again, even if the statute were applicable the question of contributory negligence would still have to be submitted to and decided by a jury.

It is apparently much more hazardous from a liability point of view for the defendant, M.K.T., to operate its trains within the Fifth Circuit jurisdiction than within the Tenth Circuit. However, if the existing Oklahoma Constitutional, Statutory and case law is judiciously applied, the scales of justice may become equally balanced between the two jurisdictions.

Federal Courts in the Tenth Circuit are not bound by Oklahoma Constitution, Art. 23 §6, requiring the issues of contributory negligence and assumption of risk to be submitted to the jury so long as there is any evidence to support them. However, the defense of contributory negligence is an affirmative defense which must be pleaded and supported by some evidence. *Miller* v. *Irby*, 227 F.2d 942 (C.A. 10th, 1955). Some evidence is required for the Court to take an issue of fact and decide it as a matter of law. *Miller* v. *Irby, supra*; *Oklahoma Natural Gas Co.* v. *McKee*, 121 F.2d 583 (C.A. 10th, 1941). The above cases deal with disposition of a case after evidence had been given at trial.

The District Court in *Heath* v. *John Deere Company of Kansas City*, 308 F.Supp. 235 (D.C.W.D. Okla., 1969) de-

nied defendant's Motion for Summary Judgment stating at page 308:

> "In a summary judgment situation, *it is a rare case where summary judgment may be granted resolving the issues of contributory negligence and assumption of risk as a matter of law.*" (Emphasis added.)

Applying this general rule as propounded by the Oklahoma courts, who, other than the jury, is to say whether under all of the facts, circumstances and reasonable inferences to be drawn therefrom, that plaintiff's contributory negligence, if any, was the proximate cause of decedent's injuries?

At page 5 of the Tenth Circuit Court's Opinion Affirming Summary Judgment in this case, the court states that its decision in *Smoot* v. *Chicago, Rock Island & Pacific Railroad Co.*, Okla., 378 F.2d 879, 874 (C.A. 10th, 1967), is clearly distinguishable from the case at bar because the crossing was blocked by a fast moving train but a split second before collision, allowing no appreciable time for notice of the danger.

In *Smoot, supra,* the plaintiff's decedent was a passenger in a car which met defendant's train almost simultaneously at a crossing in Oklahoma City. Defendant's Motion for Summary Judgment was based upon the undisputed fact that decedent's car struck the train and that, therefore, the train was already upon the crossing. It was argued that once the train took occupancy of the crossing it became impervious to liability. In rejecting this contention and reversing the trial court's Order Sustaining Summary Judgment the Tenth Circuit Court said:

> "The Oklahoma decisions which preclude recovery of damages for one who drives his vehicle into a train already on a crossing are premised on the theory that the train's presence on the crossing in itself constitutes sufficient notice or warning to the driver of a vehicle. *Common sense dictates that, to be meaningful, such notice or warning by occupancy must be timely enough* to alert the driver of a motor vehicle to the impending danger and afford him adequate opportunity to take the necessary precautions to prevent collision." (Emphasis added.)

Does not "common sense" also dictate that for a railroad car standing on a crossing under the conditions in this case to constitute a warning to the motorists and thereby make it subject to the general rule, the train would have to be visible for a distance at least equal to the required statutory warning, which only provides that the warning be "suitable"? Query: Who should dictate whether a warning device is "suitable"?

The *Smoot* case, *supra,* deals with the specific problem of the length of time that a train has been in occupancy of the crossing prior to the collision and states that such time lapse must be sufficient to alert the public to the impending danger. More important, the case says that the driver of a motor vehicle is entitled to sufficient warning of the presence of a train upon a track to enable the driver to take precautions to prevent the collision. We believe that whether or not Leroy Kirkland had such warning is a question for the trier of fact.

Adequacy of warning was an issue in the case of *Dunn* v. *St. Louis-San Francisco Railway Company*, Okla., 370

F.2d 681 (C.A. 10th, 1967). Plaintiff's decedent was a passenger in a truck which was driven into the side of a boxcar that was either standing or just stopping, halfway across the highway at night. The Court held that it was proper for the case to be submitted to the jury (verdict was for the defendant) on the question of whether an inoperative wig-wag warning device constituted an invitation to the driver of the truck to enter the crossing. It is significant that this case was allowed to go to the jury in view of substantial evidence given by unbiased witnesses that a trainman was standing in the roadway waving an electric lantern at the time the plaintiff drove his vehicle into the train. The Court of Appeals in affirming the verdict and judgment for the defendant railroad stated that the question which the trier of fact had to determine was whether the boxcar had entered the intersection long enough ahead of the crash for a reasonably prudent person to have been warned in time.

The trier of fact in the *Dunn* case, *supra*, was entitled to determine the adequacy of the warning where a defective warning device was supplanted by a signalman at the crossing. Would it not follow, indeed demand, that in the case before this Court, where there was an unpainted (defective) crossing sign and no crewman or other warning device to take its place, the jury be allowed to determine the adequacy of the warning, or indeed, to determine whether there was any warning at all!

Dunn and *Smoot*, *supra*, confirm the argument of the plaintiff. That is, that whether or not the black, immobile flatcar upon defendant's crossing was a suitable substitute

warning for the "suitable" statutory warning device required by law is a question of fact for the trier of fact. Further, the rules propounded in the *Smoot* case require that for the train to constitute sufficient warning such notice or warning by occupancy must be timely enough to alert the driver of the impending danger. Is it not for the jury to say what amount of time that the train occupies the crossing will constitute adequate warning? And does not that determination depend upon all the circumstances surrounding the collision?

Had the flatcar been moved onto the crossing in broad daylight, then no time lapse at all might have been adequate warning. But to move the flatcar across the road on a very dark, cloudy night under the prevailing circumstances, several hours time might be considered by a jury as inadequate time to warn an approaching motorist.

Proximate cause is often left to permissible inferences from established facts. *Champlin* v. *Oklahoma Furniture Mfg. Co.*, 269 F.2d 918, 74 A.L.R.2d 978 (C.A. 10th, 1959).

The permissible inferences which may be drawn from the facts in this case are numerous and will be discussed further *infra*.

The substantive law of the State of Oklahoma is the same in regard to the duty owed to the traveling public by a railroad as in South Carolina; that is, liability for injuries resulting from collision with a standing railroad car will depend on whether the extra-hazardous condition has been created by the railroad. The case of *Peagler* v. *Atlantic Coast Line Railroad Company*, S.C., 107 S.E.2d 15 (1959), is interesting by comparison and by contrast to

the case at bar. In the *Peagler* case, the defendant parked completely across a highway, a low, black empty pulpwood flatcar. It was night and the roadway was black surfaced. A Chevrolet auto driven by the plaintiff collided with the side of the flatcar, resulting in personal injuries for which he sued and recovered. The crossing had no flashers or blinker lights and no flares, fusees or flagman was present to warn the public of the motionless car. The flatcar was 42 feet 8 inches in length (M.K.T.'s car was 48 feet 6 inches in length). The avenue approaching the crossing was straight and level for a distance of approximately 1,200 feet. The driver was driving on the right side of the highway in the direction he was traveling. Leroy Kirkland was in his proper lane on an unlevel road as he approached the crossing and then skidded 32 feet in a straight line to the center of the road. In the *Peagler* case, the driver was misled by auto lights on the opposite side of the flatcar. In our case, the only light in the vicinity was a farm light on the opposite side of the flatcar. We will never know whether the farm light behind the flatcar misled Leroy Kirkland into believing the road was clear. He didn't live long enough to become a witness.

In *Peagler*, there were no flashing lights, no gates, and even though there were five train crewmen aboard the train, none bothered to flag the crossing, nor were there any flares or fusees in place.

In contrast to the above facts, which are very similar to those in the case at bar, the flatcar in the *Peagler* case had white letters and figures upon it; the M.K.T. flatcar in this case did not. After verdict for the plaintiff, the

Supreme Court of South Carolina, in reviewing the above facts, stated at page 9:

> "It is reasonably inferable from all the testimony that a reasonably prudent person, even if he knew of the existence of the crossing, would have concluded from the automobile lights approaching from the north side of the crossing, and *misled by the stillness and blackness of the empty flatcar obstructing the highway, which blended with the black surface of the highway, that the crossing was clear and unobstructed and that no train was using the track.* It is reasonably inferable from the evidence that the diversion of respondent's attention by the shifting headlights of an oncoming car added to the obscurity of conditions existing at the crossing at the time so as to produce a deceptive and delusive condition. It is reasonably inferable from the testimony that an unusual and extra-hazardous situation was created at the crossing. It is likewise inferable from the testimony that because of the unusual and extra-hazardous condition at the crossing, the same having been created by the appellants, that they should have taken whatever precautionary measures due care dictated to warn the traveling public of the presence of the unlighted flatcar spanning the highway." (Emphasis added.)

All of the reasonable inferences that were made from the evidence in the *Peagler* case would certainly be inferable from the allegations and facts in the case at bar.

It is a fundamental maxim that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing

the motion. Thus, the standard to be applied on a motion for summary judgment is analogous to that used on a motion for a directed verdict. *American Manufacturers Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 11 F.R.Serv.2d 1220, 388 F.2d 272 (C.A. 2nd, 1967).

Even where the facts are not in dispute, such as in the case at bar, summary judgment should not be granted when the parties nevertheless disagree as to the inferences which may properly be drawn. A jury of reasonable men could draw different inferences from defendant's failure to meet minimum warning sign requirements under the statute.

The court's discretion plays no role in granting of a summary judgment, it being held that the granting of such judgment *must* be proper or such action is subject to reversal. *National Screen Service Corp.* v. *Poster Exchange, Inc.*, 6 F.R.Serv.2d 1039, 305 F.2d 647 (C.A. 5th, 1962).

The United States Supreme Court has held in *United States* v. *Diebold, Inc.*, 369 U.S. 654, 8 L.Ed.2d 176, 82 S.Ct. 993 (1962), in a civil antitrust suit brought under the Clayton Act, that where there is a choice of inferences to be drawn from subsidiary facts, summary judgment cannot be sustained. In the same opinion this Court held that inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion.

If inconsistent hypotheses might reasonably be drawn from undisputed facts over which the minds of reasonable men might differ, then a case is not vulnerable to summary judgment.

CONCLUSION

If the trial court and the Tenth Circuit Court's affirmation of summary judgment is allowed to stand, then the motoring public of Oklahoma is in extreme danger of bodily injury and death from inevitable collisions with railroad cars which will be left immobile on unmarked, unlighted crossings at night under hazardous conditions.

The Supreme Court of this state did not anticipate nor intend when the general rule was adopted in *Raley* v. *Thompson, supra,* that such immutable unbending application would be attached to their pronouncement of the law. The rule, if applied with reason and the enlightened intent to do "justice for all," can be a fair rule, as was intended.

If the Court had intended the rule to be rigid and unbending, why would the word "ordinarily" and the phrase "in the absence of unusual circumstances" have been included? The alarming aspect of this case is that the rule has been applied in a rigid, uncompromising manner.

When the general rule is viewed in the sharp glare of sunlight, it is a reasonable pronouncement. A motorist should be charged with notice of the presence of a train standing across a roadway in plain sight—and he has been so charged in this state.

However, the clear exception to that general rule is that where extra-hazardous conditions exist then the general rule has no application.

The question which keeps returning in this case is how may a railroad create a condition more hazardous to the public than the one which existed for Leroy Kirkland on the night of December 23, 1971? No single element alone can be said to have pushed the situation over into the "extra-hazardous" category. It was each and every attending circumstance which created the trap into which Kirkland drove and which ultimately cost him his life. The fact that the flatcar was low in profile, black, unpainted, unmarked, empty and without lights or reflectors would not be persuasive had this tragedy occurred in the daylight; the fact that the roadway, beginning approximately 120 feet to the east of the collision site, was irregular in configuration and was constructed of black asphalt would not be meaningful had the flatcar been positioned upon the track during daylight hours; the fact that no light, even from street lights, was present at the scene, with the exception of a farm light 100 yards to the west or behind the flatcar would have been moot in daylight hours; and the fact that the statutory crossing sign was grey, unpainted and unmarked and that the defendant neglected to post a signalman or merely light a flare or fusee or other warning device could have been unnecessary during the daytime; but take these conditions and add a dark, cloudy night and it is suddenly the most dangerous of situations—no human being can be charged with the foresight to anticipate the camouflaged trap placed completely across the roadway upon which he is legally traveling in a reasonable manner. What reasonably prudent man could conceive of such a condition? A more hazardous condition could not have been present even if it had been planned.

The best estimate of the location of the crossarm warning sign is given in the depositions as approximately 10 to 12 feet north and 25 feet east of the tracks where the collision occurred. The facts are undisputed that this sign was in a state of bad repair; it was grey, there was no paint or lettering upon it. Would Leroy Kirkland have seen the statutory warning if it had been in good repair? Could not a jury infer from the evidence that (1) the disrepair of the sign was the proximate cause of his death or (2) that the sign, even had it been freshly painted, was inadequate warning under the conditions prevailing at the scene and was therefore the proximate cause of his death?

It is undisputed that the railroad violated the statutory requirement of erecting a "suitable" warning device at this crossing. This violation creates a case of primary negligence. *Buck* v. *Missouri-Pacific Railroad Company, supra.*

The defendant counters that the plaintiff's failure to bring his vehicle to a stop within the "assured clear distance ahead" creates a case of contributory negligence. *Oklahoma City-Ada-Atoka Ry.* v. *Nickels*, 343 P.2d 1094 (Okla. 1959).

Both questions can only be resolved by the trier of facts considering all attending circumstances, facts and the reasonable inferences to be drawn therefrom.

It is therefore respectfully submitted that the granting of summary judgment in this case constitutes reversible

error and the Petitioner, plaintiff below, asks this Honorable Court to accept this case for review.

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May, 1975

APPENDIX "A"

FILED
MAR 29 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY s/ *Ruth T. Olsen*
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DIXSIE KIRKLAND, individually and as Executrix of the Estate of LeRoy Kirkland, deceased, Plaintiff,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, et al. Defendants.

No. Civ-73-140-C

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

On this 29th day of March, 1974, upon consideration of briefs of counsel, the Motion of the Defendant for Summary Judgment is hereby sustained and IT IS, THEREFORE, ADJUDGED AND DECREED that this action be and the same is hereby dismissed.

s/ Stephen S. Chandler
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON
MAR 29 1974
ADELAIDE HOLSTON, DEPUTY

APPENDIX "B"

FILED
DEC 18 1974
HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1974

DIXSIE KIRKLAND, Administratrix of the Estate of Leroy Kirkland, deceased,

Plaintiff-Appellant,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, a corporation,

Defendant-Appellee.

No. 74-1280
(Civil 73-140-C)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Submitted on the briefs.

William M. Fancher, of Fancher & Moore, Hollis, Oklahoma, and Keith Myers, of Myers & Cummins, Hollis, Oklahoma, on the brief for Appellant.

H. D. Binns, Jr., William J. Ross, and Donald L. Cooper, Oklahoma City, Oklahoma, on the brief for Appellee.

Before LEWIS, Chief Judge; SETH and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

Dixsie Kirkland, administratrix of the estate of Leroy Kirkland, appeals from a summary judgment entered by the United States District Court for the Western District of Oklahoma. Mrs. Kirkland, an Oklahoma resident, sued the Missouri-Kansas-Texas Railroad Company, a Delaware corporation, for damages resulting from Leroy Kirkland's death, which occurred after the pickup truck he was driving collided with the railroad's stationary flatcar standing at a highway crossing. On the basis of the pleadings and discovery materials, the District Court concluded that the plaintiff's evidence did not raise a triable issue of fact under the law of Oklahoma.

Viewed in the light most favorable to the plaintiff, the pertinent facts are as follows.

At 10:20 p.m. on December 23, 1971, Leroy Kirkland was driving west on Bradford Street in Altus, Oklahoma, when his truck collided with defendant's flatcar at a crossing maintained by the defendant. As a consequence of injuries sustained in the collision, Kirkland died ten days later. At the time of the accident, the defendant's flatcar, which occupied the entire crossing and was connected on either side to a train, had been immobile on the tracks for twenty to forty seconds. The flatcar was unpainted, its color was black due to accumulated grease or oil, and it was unmarked by any visible lettering, lights or reflectors. The top of its bed stood three or four feet off the track and was supported by a two-foot thick under-structure. The night was dark. There was no illumination in the vicinity except for a distant farmlight to the west of the crossing, which plaintiff claims might have deceived the decedent into believing that the crossing was clear. The roadway in the vicinity of the crossing was made of black asphalt; the topography of the approach to the crossing was irregular with rises and dips in roadway elevation. The defendant's cross-butt warning device, which was gray in color and unmarked, was the only warning signal at the crossing.

The railroad's crew did not flag the crossing. The crew's flagman at the time of the accident was assisting another member of the crew in operating a switching device some forty feet from the crossing. State police Sergeant Eddie Becerra, who investigated the accident, stated by deposition that a man identifying himself as the train's flagman told him just after the accident that when he saw Kirkland's car approach the crossing he ran from the switching device toward the roadway in an attempt to flag the vehicle down.

Stripped to essentials, plaintiff-appellant's chief argument is that the railroad's crew knew or should have known that under the circumstances at the Bradford Street crossing on the night of the accident an approaching vehicle would be unable to observe a stationary flatcar spanning the roadway and should have posted adequate warning of the danger.

The general rule in Oklahoma is that the presence of a train or railway car on a crossing is sufficient notice to the driver of a vehicle on the highway of obstruction; in the absence of unusually hazardous circumstances the operating railway company is under no duty to provide notice or warning of the danger to drivers. Raley v. Thompson, 225 P2 171 (Okla. 1950). The rule stems in part from the Oklahoma Supreme Court's application to occupied crossing cases of the state statute requiring drivers of motor vehicles on the highway to drive at a speed and with a degree of care that will enable them to stop within the clear distance ahead.[1] That court has repeatedly held that trainmen are

[1] 47 O.S. § 11-801(a) (1971) provides:

> Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead.

not required to anticipate that a motorist will disregard the duties thus placed on him by the law. *See, e.g.*, Oklahoma City-Ada-Atoka Ry. v. Nickels, 343 P2 1094, 1098-99, (Okla. 1959); Kurn v. Jones, 101 P2 242, 244 (Okla. 1940).

The implicit exception to the general rule is that where conditions at an occupied crossing are so hazardous as to give notice to trainmen that the careful driver of a properly equipped vehicle will not be able to observe and stop for the obstruction, the trainmen have the duty to give adequate warning. Smoot v. Chicago, R.I. & P. Ry., 10 Cir. 378 F2 879, 884; *see also* Thompson v. Carter, 137 P2 956, 958 (Okla. 1943).

Under the law of many states the cited facts would assuredly prevent the granting of a summary judgment but the law of Oklahoma is clearly otherwise. Each of the factual circumstances upon which plaintiff relies has been specifically negatived as sufficient to impose liability on the railroad. These factors include blocking a crossing with a low-profile flatcar, immobility of the train, darkness, background lights, and variations in road levels. *See* Oklahoma City-Ada-Atoka Ry. v. Nickels, 343 P2 1094 (Okla. 1959); Kansas, O. & G. Ry. v. Painter, 333 P2 547 (Okla. 1958); Atchison, T. & S.F. Ry. v. Templar, 230 P2 907 (Okla. 1951); Raley v. Thompson, 225 P2 171 (Okla. 1950); Fleming v. Loch, 195 P2 942 (Okla. 1948); Thompson v. Carter, 137 P2 956 (Okla. 1943); Kurn v. Jones, 101 P2 242 (Okla. 1940). Our decision in Smoot v. Chicago R.I. & P. Ry., *supra*, is clearly distinguishable. In Smoot the crossing was blocked by a fast moving train but a split second before collision, allowing no appreciable time for notice of the danger.

The judgment is affirmed.

APPENDIX "C"

NOVEMBER TERM — JANUARY 6, 1975

Before Honorable David T. Lewis, Chief Judge, Honorable Oliver Seth, and Honorable Robert H. McWilliams, Circuit Judges

DIXSIE KIRKLAND, individually and as Executrix of the Estate of Leroy Kirkland, Deceased. Plaintiff-Appellant, v.	)	No. 74-1280
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, a corporation and JOHN DOE, whose true name is unknown to this plaintiff, Defendants-Appellees.	)	

This matter comes on for consideration of the Petition for Rehearing filed by Appellant in the captioned cause.

Upon consideration whereof, the Petition for Rehearing is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By s/ Anne Cabot
Deputy Clerk